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FILED
OCT 2 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No. 06-1684

IN THE
Supreme Court of the United States

JACK CHILINGIRIAN,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

REPLY BRIEF

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October 2, 2007

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REPLY BRIEF

The Sixth Circuit below acknowledged a clear conflict among the courts of appeals on the question whether an inconsistent verdict issued in a nonjury criminal trial is reviewable as a check against the arbitrary exercise of power. Pet. App. 13a-15a. In its opposition, the United States does not dispute the existence of the split. It argues that the petition should nevertheless be denied for two principal reasons: first, this Court's decision in *Harris v. Rivera*, 454 U.S. 339 (1981) (per curiam), somehow undermines the importance of the conflict; and, second, the district court's verdict below in fact contains no inconsistency.

Neither of the government's arguments has force. This Court's decision in *Harris* acknowledged both Judge Friendly's decision in *United States v. Maybury*, 274 F.2d 899 (1960), and the Ninth Circuit's decision in *United States v. Duz-Mor Diagnostic Laboratory, Inc.*, 650 F.2d 223 (1981), and it expressly disclaimed any intent either to overturn those cases or to resolve the issue presented here. In the years since *Harris*, neither the Second Circuit nor the Ninth Circuit has disavowed either case, and state courts and commentators continue to treat them as binding precedent, as did the Sixth Circuit here.

Similarly unpersuasive is the government's argument that there is no inconsistency between the conviction on the money-laundering conspiracy count and the acquittal on mail and wire fraud counts. Opp. 6-7. Contrary to the government's suggestion, petitioner has never relied on his acquittal on the mail and wire fraud counts as the *only* inconsistency in the district judge's verdict. To the contrary, the verdict is inconsistent because the conviction on the money-laundering conspiracy count cannot be squared with the "general finding of not guilty on all other conspiracy

charges alleged in the indictment," Pet. i; and as to that argument, the government has nothing to say.

Moreover, the right to have the federal court of appeals determine the consistency of the district court's verdict is the very right that petitioner sought to vindicate in the court of appeals, and that petitioner seeks to vindicate here. The Sixth Circuit refused to undertake that review because of its threshold determination – in conflict with that of the Second and Ninth Circuits – that a consistency review was impermissible. To the extent the government seriously disputes the inconsistency of the verdict (as the Sixth Circuit in its opinion did not), the government can argue that to the court of appeals on remand.

ARGUMENT

I. THERE IS A DIRECT, ACKNOWLEDGED, AND CONTINUING CONFLICT AMONG THE CIRCUITS.

In the decision below, the Sixth Circuit noted the conflict between the Second Circuit's *Maybury* decision and Ninth Circuit's *Duz-Mor* decision on the one hand, and the Eighth Circuit's decision in *United States v. West*, 549 F.2d 545 (8th Cir. 1977), and the Eleventh Circuit's decision in *United States v. Wright*, 63 F.3d 1067 (11th Cir. 1995), on the other. In *Maybury* and *Duz-Mor*, the courts of appeals held that inconsistent verdicts in a nonjury criminal trial were grounds for review on appeal; in *Wright* and *West*, the courts held that "inconsistent verdicts rendered by a judge provide no greater grounds for reversal than inconsistent verdicts rendered by a jury." Pet. App. 14a-15a. The Sixth Circuit then expressly aligned itself with the Eighth and Eleventh Circuits. *Id.* at 15a.

Notably, nowhere in its opposition does the United States deny the existence of a conflict. Instead, the government

suggests that this Court's opinion in *Harris* makes the inconsistent bench trial verdict here not "worthy of this Court's attention." Opp. 7. But nothing in *Harris* counsels against review here, as *Harris* itself makes clear. In *Harris*, the Court considered only the issue of whether a challenge to a state court's inconsistent bench trial verdict could be considered on federal habeas. The Court concluded that such a challenge was not of constitutional dimension, and thus could not be considered on federal habeas review. The Court in *Harris*, however, expressly disclaimed any intent to resolve the question presented here, noting that "[t]his case does not raise any question concerning the significance that an appellate court may attach to an apparent inconsistency in a verdict that is subject to review on direct appeal." *Harris*, 454 U.S. at 343. Indeed, the Court's disclaimer can only be read as a specific intent to leave *Maybury* and *Duz-Mor* undisturbed, since it followed immediately upon the Court's own detailed discussion of those cases. *See id.* at 342 n.7.

And that is exactly how the Sixth Circuit saw the matter. Far from viewing the issue as having been decided in *Harris*, the Sixth Circuit acknowledged the lack of clarity on this issue: "[t]he question of whether an inconsistent verdict rendered by a judge is reviewable, or grounds for reversal or a new trial, has not been resolved in this circuit." Pet. App. 12a.

More to the point, neither the Second Circuit nor the Ninth Circuit has overturned these precedents in light of *Harris*. And given that the Court in *Harris* expressly exempted this issue from the scope of its opinion, there would be no basis for either court of appeals to do so.

Moreover, the clear conflict among the circuits substantially understates the degree of confusion in this area of the law. State courts continue to grapple with the reviewability of inconsistent nonjury criminal verdicts, and,

although not bound by *Maybury* or *Duz-Mor*, those courts routinely cite *Maybury* and *Duz-Mor* to justify their conclusions even in the post-*Harris* world. *See, e.g.*, *State v. Knight*, 835 A.2d 47, 55-56 (Conn. 2003); *Akers v. Commonwealth*, 525 S.E.2d 13, 17 & n.3 (Va. Ct. App. 2000); *State v. Meyer*, 832 P.2d 357, 362-63 (Kan. Ct. App. 1992); *Shell v. State*, 512 A.2d 358, 362-63 (Md. 1986); *People v. O'Malley*, 439 N.E.2d 998, 1002 (Ill. App. Ct. 1982).[1]

And that is no surprise. Judge Friendly's opinion in *Maybury* captures a powerful intuition. The Second Circuit reversed Maybury's conviction "not because of any desire for *elegantia juris* but because we can have no confidence in a judgment convicting [the defendant] of one crime when the judge, by his acquittal of another, appears to have rejected the only evidence that would support the conviction here." 274 F.2d at 905. As Judge Friendly further explained:

> There is no need to permit inconsistency in the disposition of various counts so that a judge may reach unanimity with himself; on the contrary, he should be forbidden this easy method of resolving doubts. . . . We do not believe we would enhance respect for law or the court by recognizing for the judge the same right to indulge in 'vagaries' in the

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[1] The government misses the point when it argues that these state court decisions "do not establish any conflict the Court can resolve." Opp. 8. The state court decisions establish both that *Maybury* and *Duz-Mor* remain in effect, and that – contrary to the government's contention – *Harris* does not resolve either directly or by implication the issue presented here. The split among the state courts seeking to resolve the appealability issue as a matter of state law also make clear that petitioner has at the very least a substantial argument that the Sixth Circuit's decision on the reviewability of petitioner's claim is wrong, reinforcing the need for this Court's review.

> disposition of criminal charges that, for historic reasons, has been granted the jury. . . . Since we find no experience to justify approval of inconsistent judgment when a criminal case is tried to a judge, we think logic should prevail.

Id. at 903; *see also Duz-Mor*, 650 F.2d at 226 (noting that a bench trial involves "no collective deliberation and therefore no element of compromise in the assessment of the evidence . . . [nor any] need to defer to the privacy of jury deliberations or the possibility that an acquittal is merely an exercise of the jury's power of deciding 'in the teeth of both law and facts,'" (quoting *Horning v. District of Columbia*, 254 U.S. 135, 138 (1920) (Holmes, J.))).

Commentators have picked up on that theme. Defendants often choose a bench trial because they fear a jury would be "prone to mistake or guided by passion rather than reason in deciding the case." Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 Harv. L. Rev. 771, 802 n.159 (1998); *see also* Adam H. Kurland, *Providing a Federal Criminal Defendant with a Unilateral Right to a Bench Trial: A Renewed Call to Amend Federal Rule of Criminal Procedure 23(a)*, 26 U.C. Davis L. Rev. 309, 310-12 (1993). A defendant who chooses a bench trial surrenders his ability to appeal to the Sixth Amendment's requirement that jury verdicts be unanimous. It is exchanged for a modest guarantee: that the judge who is, after all, an expert capable of avoiding the mistakes that juries make and a professional who subordinates passion to reason, will reach "unanimity with himself." *Maybury*, 274 F.2d at 903.

Further, verdicts from a lone fact finder that are the product of mutually exclusive determinations on necessary facts appear unmistakably arbitrary. While many juries would likely be incapable of forming a single coherent

articulation of the reasoning they collectively used to reach a unanimous decision, no such constraint exists in a bench trial. Thus, the judge's inability to articulate a logically coherent view is arbitrary in a way that the jury's inability is not. *Cf., e.g., Daniels v. Williams*, 474 U.S. 327, 331 (1986) (stating that "the traditional and common-sense notion that the Due Process Clause, like its forebear in the Magna Carta, ... was intended to secure the individual from the arbitrary exercise of the powers of government") (citations omitted); *Wolff v. McDonnell*, 418 U.S. 539, 558 (1974) ("The touchstone of due process is protection of the individual against arbitrary action of government . . . ."). Such arbitrariness breeds cynicism and disrespect for the judiciary. That the decision-maker is unelected, tenured for life, invested with absolute immunity, and positioned to repeat the offense amplify these effects in a way not possible when a randomly constituted jury returns inconsistent verdicts.[2]

II. THIS CASE SQUARELY PRESENTS THE ISSUE.

This case presents an ideal vehicle to address the reviewability of inconsistent nonjury criminal verdicts. The government argues to the contrary, suggesting that "there was no inconsistency in the district court's verdict," Opp. 6, and arguing in particular that there is no inconsistency between conviction on money laundering and acquittal on mail and wire fraud, *id.* at 6-7. But the government's argument is flawed.

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[2] The government's suggestion that petitioner "relies on the Constitution and does not ask this Court to invoke its supervisory power," Opp. 7, is incorrect. Nothing in the question presented invokes the Constitution or limits the petitioner's arguments to those of constitutional dimension. The petition seeks review of the precise question left open in *Harris*, namely whether an inconsistency in a verdict issued in a nonjury criminal trial is reviewable on direct appeal, as a matter of the Court's supervisory power or otherwise.

First, the government impermissibly narrows the scope of petitioner's challenge by focusing solely on the acquittals on the mail and wire fraud charges. In fact, petitioner was acquitted of 32 of the 33 charges against him, and petitioner contends that the money laundering conviction is inconsistent with the entire scope of acquittals, not just the mail and wire fraud charges.

Thus, for example, petitioner contends that the money laundering conviction is irreconcilable with his acquittal on Count 30, Aiding and Abetting Interstate Transportation of Funds Taken by Fraud ("Transportation of Funds"). The government concedes that the money laundering conviction required the district court to have concluded at the very least that petitioner "laundered money knowing it to be the proceeds of the fraud alleged in the indictment and carried out by the Rashids," Opp. 9, and that petitioner intended to "conceal the nature of the proceeds," *id.* at 6. But those conclusions are flatly inconsistent with the acquittal on the Transportation of Funds charge, which also requires proof that petitioner knew the money was "stolen, converted, or taken by fraud." 18 U.S.C. § 2314.[3] The district court's conclusory assertion that there was no inconsistency in the verdict because the court had reasonable doubt about petitioner's scienter on the counts other than the money laundering count, Opp. 4, cannot be sustained. In order to be

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[3] There are no non-common elements between the two counts to reconcile Chilingirian's money laundering conviction with his acquittal of Transportation of Funds. For example, no reasonable doubt could have existed that Chilingirian "transport[ed], transfer[red] or transmitt[ed]" funds within the meaning of 18 U.S.C. § 2314. That statute, under which he was charged with Transportation of Funds, specifically applies to money transported "in interstate or foreign commerce." Chilingirian was convicted of money laundering in part based on his creation of a trust account in Canada. Pet. App. 8a; Opp. 2-3. Thus, transporting was necessarily established by the conviction, and the district court never suggested otherwise.

convicted of money laundering, petitioner must at least have known that the nature of the activity was illegal, as the statute requires that he know the property involved in the transaction "represents the proceeds of some form of unlawful activity." 18 U.S.C. § 1956(a)(1); *see also id.* § 1956(c)(1).

But the government cannot explain (and does not even try to explain) how, if petitioner "laundered money knowing it to be the proceeds of the fraud alleged in the indictment and carried out by the Rashids," Opp. 9, he could possibly have *not known* that the proceeds that resulted from those actions were "stolen, converted, or taken by fraud" for the purposes of the Transportation of Funds count. The Rashids were not charged or convicted on *any* basis other than fraud, so there is no other crime or illegal activity that petitioner could have known resulted in these proceeds. In addition, this case is not one where the defendant allegedly participated in a convoluted or elaborate money laundering scheme where the origin of the proceeds and the unlawful activity was unclear. All of the allegations stated that petitioner was involved with structuring the very transactions at issue in the fraud charges. Pet. App. 8a-9a. Indeed, the government acknowledged the interdependency of the charges at trial by "suggest[ing] that if Petitioner conspired to launder money, then he also conspired to defraud." *Id.* at 13a. The only reasonable explanation is that the verdict is inconsistent.

Moreover, the government's argument on the absence of any inconsistency is misguided. The Sixth Circuit did not decide the case on the grounds that there was no inconsistency – indeed, it did not even suggest that that might be the case. Instead, it decided the case on the threshold question of whether it was even open to an appellate court to undertake such a review for inconsistency. All along, petitioner has sought to have an appellate court confront the question of whether his conviction on a single money

laundering count was inconsistent with his acquittal on the 32 other counts in the indictment, and the Sixth Circuit has refused to even consider the issue. The government should not now be able to justify that threshold denial on the basis of one conclusory – and demonstrably wrong – paragraph in its opposition. Although petitioner believes the inconsistency is stark and unavoidable, to the extent that this Court's decision does not resolve the issue, it would remain open to the government to argue to the contrary on remand once this Court resolves the threshold issue of appealability.

III. THE INCONSISTENT VERDICT ALSO CONSTITUTED AN IMPERMISSIBLE AMENDMENT OF THE INDICTMENT.

Finally, for the same reasons that the verdict of the district judge is inconsistent and should not be allowed to stand, the verdict is also at odds with the language of the indictment and is therefore impermissible. The indictment specified that Petitioner had specific knowledge and participated in the fraud and laundered money in furtherance of the fraud. *See* Pet. 20-30. The Sixth Circuit's conclusion that an amendment of the indictment did not occur conflicts with established precedent in other circuits, namely *United States v. Rahseparian*, 231 F.3d 1257 (10th Cir. 2000), and *United States v. Handakas*, 286 F.3d 92 (2d Cir. 2002), *rev'd on other grounds*, *United States v. Rybicki*, 354 F.3d 124 (2d Cir. 2003). This error constitutes a separate basis for reversal that should be heard by this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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